

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Implementation of the Local Competition)	
Provisions in the Telecommunications Act)	CC Docket No. 96-98
Of 1996)	
)	
Inter-Carrier Compensation for)	CC Docket No. 99-68
ISP-bound Traffic)	

Comments

The National Exchange Carrier Association, Inc. (NECA) submits these comments in response to the Commission's *Public Notice* in the matter captioned above.¹

The *Public Notice* indicates that on March 24, 2000, the United States Court of Appeals for the D.C. Circuit vacated certain provisions of the Commission's *Reciprocal Compensation Ruling*, and remanded the matter to the Commission.²

The Court ruled that the Commission had not sufficiently justified the "application of its jurisdictional analysis in determining whether a call to an ISP [internet service provider] is subject to the reciprocal compensation requirement of section 251(b)(5)."³ In reaching this conclusion, the Court said that "(1) the Commission failed to apply its definition of "termination" to its analysis; and, (2) cases upon which the Commission relied in its end-to-end analysis can be distinguished on the theory that they

¹ See Comment Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit; CC Docket Nos. 96-98, 99-68; 65 Fed. Reg. 43331 (2000) (*Public Notice*.)

² See *Public Notice* at 2, citing *Bell Atlantic v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000).

³ *Id.* at 2, citing *Bell Atlantic* at 3-6.

involve continuous communications switched by IXC's, as opposed to ISP's, which are not telecommunications providers."⁴ Additionally, the Court remanded because it found that the Commission did not satisfactorily explain how its conclusions about ISP-bound traffic comport with statutory definitions of "telephone exchange service" and "exchange access service."⁵ The Commission now seeks comment on the "jurisdictional nature of ISP-bound traffic, and the scope of the reciprocal compensation requirement of section 251(b)(5), and on the relevance of the concepts of 'termination', 'telephone exchange service', 'exchange access service', and 'information access'."⁶

The instant matter calls for the Commission to make firm several key points. First, the Commission should reinforce its determination that Internet call paths are continuous, originating with the calling party, and "terminating" at one or more Internet sites that may be located anywhere. These calls do not terminate at the ISP point of presence.

The Commission's application of the "end-to-end" analysis to enhanced service provider (ESP) traffic is amply supported in prior decisions.⁷ In this proceeding on remand, the Commission should reaffirm its application of the end to end analysis, and

⁴ *Id.*

⁵ See *Public Notice* at 2.

⁶ *Id.*

⁷ See, e.g., Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, *Order*, 3 FCC Rcd 2631, 2631, ¶ 2 (1988); Access Charge Reform, *First Report and Order*, 12 FCC Rcd 15982, 16131-32, ¶ 341 (1997) (*Access Charge Reform Order*); and *GTOC Tariff Order* at ¶ 19.

assure the court that language contained in the Commission's *Access Charge Reform Order* was not intended to contradict these prior analyses.⁸

The Commission must clarify that that ISP-bound traffic is not "telephone exchange service" under the Act. The Commission concluded, in its *Advanced Services Remand Order*, that "(t)he primary distinction between [telephone exchange service and exchange access] is that, while telephone exchange services permit communication 'within a telephone exchange' or 'within a connected system of telephone exchanges within the same exchange area,' exchange access refers to access to telephone exchange services or facilities for the purpose of originating or terminating communications that travel outside an exchange."⁹ Because most ISP-bound traffic does not originate and terminate within an exchange, this traffic "does not constitute telephone exchange service within the meaning of the Act."¹⁰ The Commission should reaffirm this interpretation in this proceeding on remand.

Finally, the *Bell Atlantic* Court has sent a clear signal that the Commission must be consistent with respect to its jurisdictional analysis. Although not specifically

⁸ The Court was concerned with the Commission's statement in the *Access Charge Reform Order* that "it is not clear that ISPs use the public switched network in a manner analogous to IXC's." 12 FCC Rcd at 16133, ¶ 345. While this assertion may *seem* true in a general sense (IXCs are typically seen as offering point-to-point voice telephone services, while ISPs are seen as offering enhanced data services) there is little basis in fact for such assumptions. For example, consider the increasing use of "Internet Telephony" (a service that permits ISP end users to place voice calls over the Internet to ordinary telephones located anywhere in the public switched telephone network). In this case, ISPs use the network in *exactly* the same manner as IXCs, albeit with different technology. A less obvious case may involve Internet e-mail, which essentially is a point-to-point transmission of data between end users that is no different from a jurisdictional perspective than the use of ordinary telephone lines to transmit other types of data (for example, telephone "faxes"). Another example is the use of "chat rooms", in which Internet users correspond in real time with other users. No user would suggest, in these instances, that the called party is the ISP, or that the transmissions end at the ISP's point of presence.

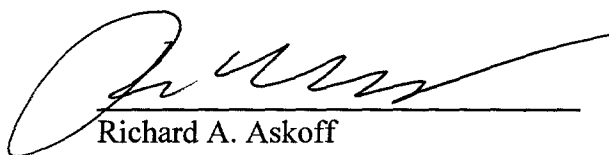
⁹ See 15 FCC Rcd at 391, ¶ 15 (note omitted).

¹⁰ *Id.* at 391-392, ¶ 16.

addressed in the *Bell Atlantic* decision, the Commission's current practice requires carriers to treat Internet minutes as *interstate* for tariffing purposes, but as *intrastate* for jurisdictional separations purposes,¹¹ a glaring example of jurisdictional inconsistency. To avoid being trapped in further miasmas, the Commission must take immediate steps to enable rate-of-return carriers to treat Internet-related costs as wholly interstate, for separations purposes, as long-advocated by NECA and others.¹²

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¹¹ See, e.g., Letter from Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, to Dale Robertson, SBC Communications, Inc. (May 18, 1999) (on file with the Commission). "Although the Commission has ruled that ISP-bound traffic is largely interstate in nature, the Commission up to now has consistently characterized the traffic-sensitive costs associated with ISP-bound traffic as intrastate for jurisdictional separations purposes. (note omitted)"

¹² See, e.g., Jurisdictional Separations Treatment of Internet Traffic, *Joint Reply to Opposition*, filed by NECA and Organization for the Promotion and Advancement of Small Telephone Companies (OPASTCO), ASD No. 99-30, at 2, July 12, 1999. See also Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Separations Simulation Cost Study Tool, *Comments of the National Exchange Carrier Association*, CC Docket No. 80-286, at 3, filed Dec. 17, 1999.

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I hereby certify that a copy of the foregoing Comment was served this 21st day of July 2000, by electronic filing or US Mail to the persons listed below.

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